



To the Honorable Council
City of Norfolk, Virginia

April 14, 2015

From: David S. Freeman, AICP
Director of General Services

Subject: Encroachment Agreement
for Outdoor Dining – Omohundro
Avenue and 123 W 21st Street

Reviewed: Sabrina Joy Hogg
Sabrina Joy-Hogg, Deputy City Manager

Ward/Superward: 2/6

Approved: Marcus D. Jones
Marcus D. Jones, City Manager

Item Number:

R-11

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** PBS Ghent, LLC dba 80/20 Burger Bar
123 W 21st Street
Norfolk, VA 23517

Building Owner:
George Christie
477 Viking Drive
Virginia Beach, VA 23452

III. **Description**

This agenda item is an Encroachment Agreement to permit George Christie and restaurant operator PBS Ghent, LLC dba 80/20 Burger Bar to encroach approximately 480 square feet into City of Norfolk right-of-way. The purpose of this encroachment is to allow outdoor dining to encroach into the right-of-way located at Omohundro Avenue and 123 W 21st Street.

IV. **Analysis**

An encroachment is an object or structure that infringes into the City of Norfolk's right-of-way or property. Norfolk City Code, Section 42-10, requires all encroachments into City rights-of-way and properties to be approved by City Council.

Ordinance number 43,980 granted permission to George Christie to encroach into the right of way of Omohundro Avenue at 123 W. 21st Street. The original Encroachment Agreement permitted George Christie to erect a railing structure to enclose tables and chairs for outdoor

dining. Mr. Christie then granted the former restaurant operator, David Houseman, t/a "The Boot" permission to use the encroaching area for outdoor dining. The term of the encroachment was for five (5) years; commencing October 1, 2010, and terminating September 30, 2015. "The Boot" has since vacated the premises.

This new Encroachment Agreement will permit PBS Ghent, LLC dba 80/20 Burger Bar to encroach approximately 480 square feet into City of Norfolk right-of-way. The term of the encroachment is no longer than five (5) years, commencing on April 1, 2015 and terminating March 31, 2020.

Hours of Operation	Outdoor Seating Capacity
Mon – Sat 5:00 PM - 2:00 AM Sunday - 11AM - 2AM	24

V. Financial Impact

The applicant will pay the City an annual rent in the amount of \$2,880.00, paid in monthly installments of \$240.00 for a five year term.

VI. Environmental

There are no known environmental issues associated with this property.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action

The Design Review Committee and Planning Commission approved this location for outdoor dining in 2009.


IX. Coordination/Outreach

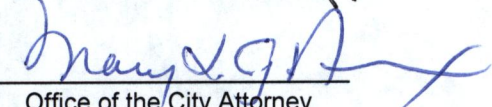
This letter has been coordinated with the Department of General Services - Office of Real Estate and the City Attorney's Office.

Supporting Material from the City Attorney's Office:

- Ordinance
- Encroachment Agreement


3/17/2015 - bjl

Form and Correctness Approved: 

By 
Office of the City Attorney

NORFOLK, VIRGINIA

Contents Approved:

By 
DEPT. General Services

ORDINANCE No.

AN ORDINANCE GRANTING PBS GHENT LLC PERMISSION TO ENCROACH INTO THE RIGHT OF WAY OF OMOHUNDRO AVENUE AT 123 WEST 21ST STREET APPROXIMATELY 480 SQUARE FEET FOR THE PURPOSE OF OUTDOOR DINING AND APPROVING THE TERMS AND CONDITIONS OF THE ENCROACHMENT AGREEMENT.

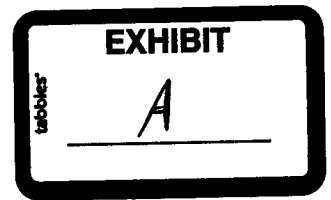
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BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That the terms and conditions of the Encroachment Agreement between the City of Norfolk and PBS Ghent LLC. ("80/20"), a copy of which is attached hereto as Exhibit A, are hereby approved, and in accordance therewith, permission is hereby granted to 80/20 to encroach into the right of way of Omohundro Avenue at 123 W. 21st Street approximately 480 square feet for the purpose of outdoor dining and for no other purpose.

Section 2:- That the terms and conditions of the Encroachment Agreement are hereby approved and the City Manager is hereby authorized to execute the Encroachment Agreement, to make amendments consistent with the terms and conditions and do all things necessary for its implementation.

Section 3:- That this ordinance shall be in effect from and after its adoption.



ENCROACHMENT AGREEMENT

This Encroachment Agreement (hereinafter "Agreement") is made and entered into this _____ day of _____, 2015, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia (hereinafter "City"), and **PBS GHENT, LLC dba 80/20 BURGER BAR** (hereinafter known as "Tenant").

WITNESSETH:

1. **ENCROACHMENT AREA.** City hereby grants permission to Tenant to encroach into the right of way of Omohundro Avenue at 123 W 21st Street, with a fenced in dining area consisting of a railing, free standing umbrellas and tables, an area measuring approximately 480 square feet, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of an outdoor dining area and no other purposes. The encroachment currently allows the minimum 3' clearance for ADA along the sidewalk in three areas and has been in place for many years. The rest of the sidewalk has the City's required 5' pass and repass ADA clearance. Should the City receive any complaint concerning the minimum 3' clearance the encroachment will have to be changed to accommodate the City's required 5' pass and repass ADA or will be taken to City Council for revocation of the agreement.

2. **USE.** Tenant shall be permitted to occupy the Encroachment Area for outdoor dining uses in conjunction with the operation of the restaurant as a dining facility. City agrees to permit Tenant to occupy the Encroachment Area.

3. **TERM; TERMINATION.** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on April 1, 2015 or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on March 31, 2020, unless the lease between Owner and

Tenant (the "Lease") shall terminate earlier in which event this Agreement shall likewise terminate. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Owner, or their successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION.** As compensation for the privilege of encroaching into the right of way, Tenant shall pay City annual compensation in the amount of Two Thousand Eight Hundred Eighty Dollars (\$2,880.00) in monthly installments of Two Hundred Forty Dollars (\$240.00) beginning on the 1st day of April, 2015 or the day the ordinance is effective whichever is later. Tenant shall pay these monthly installments of compensation directly to the City by check payable to the "**Treasurer, City of Norfolk**" and sent to:

Office of Real Estate
232 E. Main Street, Suite 250
Norfolk, Virginia 23510.

5. **LATE FEES.** For any late payments received 5 days after the first of each month, Tenant shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES.** City shall not be responsible for utilities of any type used within the Encroachment Area. Tenant shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

7. **REPAIRS.** Tenant shall keep and Tenant shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All

such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS.** Tenant shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area. In addition, Tenant shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **CITY'S RIGHT TO ENTER AND CURE.** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Tenant to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on demand. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Tenant's default in making repairs.

The City of Norfolk's operation, maintenance, repair, or replacement of utilities located within the City of Norfolk's right-of-way may result in the removal of the encroaching items by the Tenant, as necessary, within eight (8) hours upon City notification to allow maintenance of utilities. The City of Norfolk is not responsible for any such damage, replacement, or reinstallation costs.

10. **NOTICE.** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Office of Real Estate
232 E. Main Street, Suite 250
Norfolk, Virginia 23510.

Tenant: PBS Ghent, LLC
Dba 80/20 Burger Bar
123 W 21st Street
Norfolk, VA 23517

With copies to: City Attorney
810 Union Street, Room 900
City Hall Building
Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS.** Tenant agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Tenant will not allow any air, water or noise pollution to occur in the Encroachment Area. Tenant hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Tenant shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to occupancy by Tenant.

12. **DESTRUCTION.** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

13. **NON-LIABILITY OF CITY.** City shall not be liable for any damage or injury which may be sustained by Tenant or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, heating or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Tenant, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

14. **REMOVAL OF SNOW.** Tenant agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

15. **ALTERATIONS.** Tenant covenants and agrees that they will not make any improvements, changes installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Design Review Committee and Norfolk's Planning Commission. If Tenant installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Tenant hereby agrees to remove, if requested by City, any improvements, additions, installations, renovations, changes on or to the Encroachment Area upon termination of

this Agreement. In the event Tenant fails to remove and are requested to do so by City, then City may remove the improvements, additions, installations, renovations, changes and Tenant shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING.** City and Tenant agree that the permission to encroach granted hereby may not be assigned by Tenant.

17. **SURRENDER BY OWNER.** Tenant will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Tenant shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Tenant's use of the Encroachment Area. If Tenant has been requested to remove and fails to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Tenant shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE.** Tenant shall maintain in full force and effect a Commercial General Liability insurance policy, occurrence form, for the duration of this agreement. The policy will provide combined single limit for bodily injury, death and property damage insurance in the amount of two million dollars (\$2,000,000.00) combined single limit, or one million dollars (\$1,000,000.00) per occurrence, and two million dollars (\$2,000,000.00) aggregate for injury to or death of persons and, or, damage to or loss or destruction of property, insuring City and Tenant against liability claims and suits arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas. The policy shall be endorsed as primary insurance in favor of City naming the City, its officers, employees, agents and representatives named as Additional Insured, as evidenced by a Certificate of

Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to the City Manager if the insurance is cancelled or modified.

19. **INDEMNIFICATION.** Tenant shall indemnify and save harmless City from all fines, penalties, costs, suits, proceedings, liabilities, damages, claims and actions of any kind arising out of the use and occupation of the Encroachment Area by reason of any breach or nonperformance of any covenant or condition of this Agreement by Tenant, or by Tenant's intentional act or negligence, and not caused in whole or in part by City. This indemnification shall extend to all claims of any person or party for death or injury to persons and damage to any property, and to legal expenses, including reasonable attorney's fees, incurred by City in the defense of such claims or incurred by City as a result of a breach of any provision of this Agreement by Tenant, but does not extend to circumstances caused in whole or in part by City.

20. **FIXTURES.** City covenants and agrees that no part of the improvements constructed, erected or placed by Tenant in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Tenant to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Tenant in the Encroachment Area shall be and remain the property of Tenant, unless such improvements are not removed upon termination of this Agreement.

21. **ENVIRONMENTAL COMPLIANCE.**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. §§6901 et seq.) (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§9601 et seq.) (CERCLA) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPA) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of Tenant, including but not limited to Tenant's interest in the Encroachment Area or any of Tenant's property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Tenant may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Tenant shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Tenant shall not cause or permit, as a result of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Tenant shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Tenant shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, Tenant shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 21 shall apply to any successor in interest to Tenant, whether due to merger, sale of assets or other business combination or change of control.

(e) Tenant hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or

indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Tenant's failure to comply strictly with the provisions of this Section 21. The provisions of this Section 21 shall survive the termination of this permission granted by this Agreement.

22. **LIENS OR ENCUMBRANCES.** If because of any act or omission of Tenant, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Tenant shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Tenant of the filing thereof, and Tenant shall have the right to contest the validity of such lien if it so chooses.

23. **APPLICABLE LAW.** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

24. **WAIVER OF TRIAL BY JURY.** To the extent permitted by law, City and Tenant mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Tenant by this agreement.

25. **OTHER REQUIREMENTS.**

(a) Tenant shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(b) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(c) Tenant's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(d) A trash can compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(e) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee.

IN WITNESS WHEREOF, Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

CITY OF NORFOLK

By: _____
City Manager

ATTEST:

City Clerk

PBS GHENT, LLC dba 80/20 BURGER BAR

By: _____

Title: _____

APPROVED AS TO CONTENTS:

Department of General Services

APPROVED AS TO FORM & CORRECTNESS:

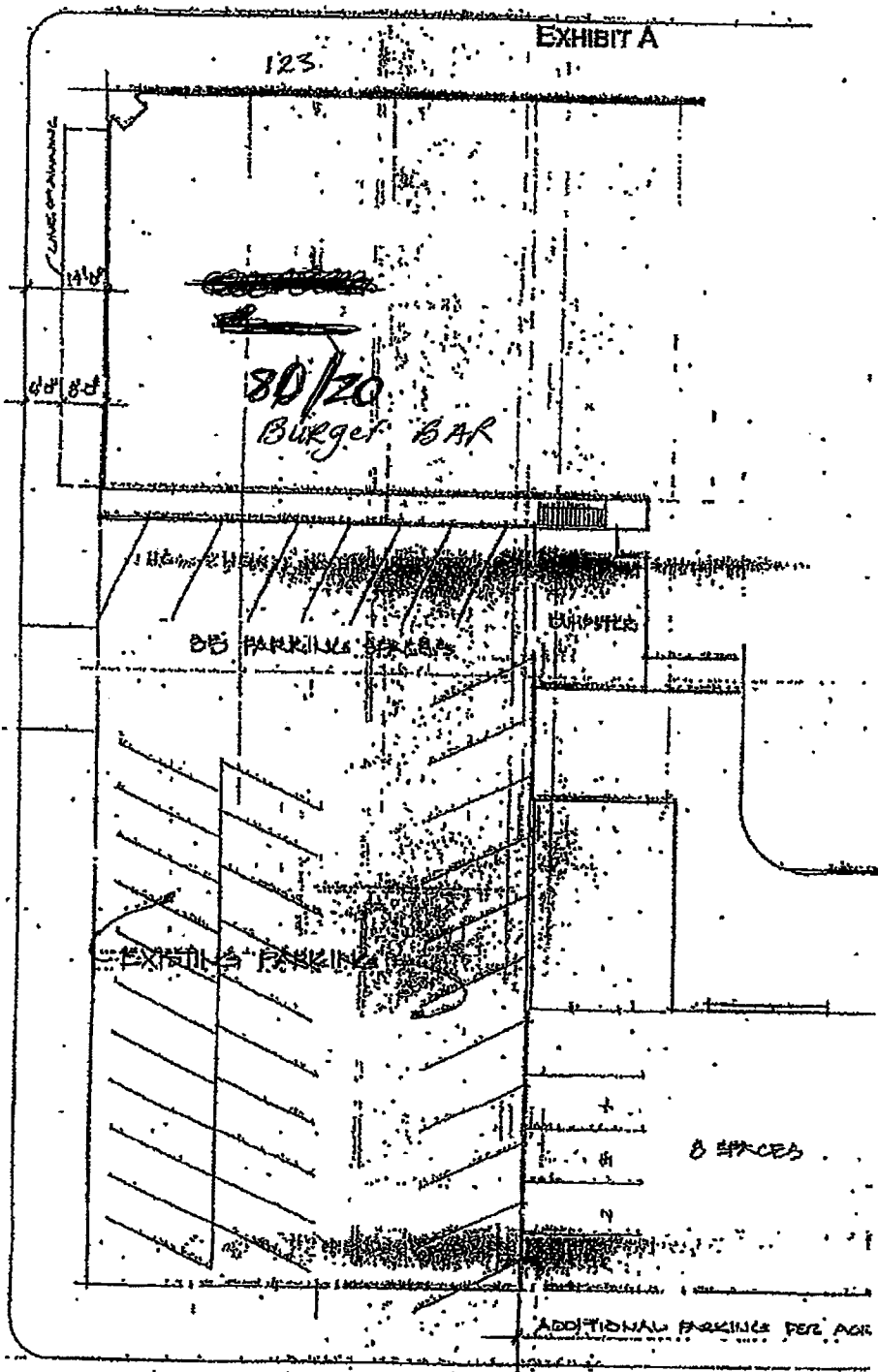
Deputy City Attorney

W 21ST STREET (70')

EXHIBIT A

123

OMOHUNDRO AVENUE (60')



W 20TH STREET (70')